

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD JAMES FARRELL,

Defendant-Appellant.

UNPUBLISHED
November 3, 2009

No. 288144
Oakland Circuit Court
LC No. 2006-206284-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of seven to 22½ years. Defendant appealed by right, challenging the scoring of Offense Variables 6 and 19 under the sentencing guidelines, and challenging also the trial court's decision to impose a minimum sentence exceeding the recommended range under the guidelines. This Court rejected the scoring challenges, but remanded this case to the trial court for resentencing or rearticulation of its reasons for departing from the guidelines. *People v Farrell*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2008 (Docket No. 273907), slip op at 5. On remand, the trial court retained its original sentence while placing on the record additional commentary concerning the reasons for departure. Defendant again appeals as of right. We again vacate the sentence, and this time remand this case to the trial court for resentencing before a different judge. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

As noted in this Court's earlier opinion in this case, the prosecuting attorney presented evidence that defendant was driving behind a school bus followed by another car, but that when the bus activated its warning lights and slowed to stop, and the car between defendant's and the bus slowed to stop, defendant swerved into the left turn lane and accelerated considerably beyond the speed limit and, without ever braking, then struck and killed a 15-year-old girl who was crossing the street to catch the bus. Slip op at 1.

In this appeal, defendant again challenges the trial court's scoring of Offense Variables 6 and 19 along with the court's decision to depart from the guidelines recommendation. We find merit in the latter, but decline to reach the former.

An appeal by right following a remand is limited to issues arising from the remand. *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975). "Under the law of the case

doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue.” *Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997). Because this Court decided, and rejected on the merits, defendant’s challenges to the scoring of Offense Variables 6 and 19 in the earlier appeal, the matter is not subject to further review in this claim of appeal. See *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). Accordingly, we turn our attention to defendant’s single cognizable issue before this Court.

Defendant’s minimum sentence of seven years’ imprisonment constitutes a departure from the recommended minimum term under the sentencing guidelines, which was 21 to 71 months. Whether a particular sentencing factor exists is reviewed for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). Whether a sentencing factor is objective and verifiable is reviewed de novo. *Id.* at 77-78. Whether the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 78. For purposes of deciding whether to depart from the recommended range under the guidelines, an abuse of discretion occurs where the trial court chooses an outcome falling outside a “principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A trial court must impose a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons for a departure and the court states those reasons on the record. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003); MCL 769.34(3). To be “substantial and compelling,” a reason must be both objective and verifiable. *Babcock, supra* at 257-258. Additionally, the reason must “keenly” or “irresistibly” grab a court’s attention and be of “considerable worth” in deciding the length of a sentence. *Id.* at 258. “A court shall not base a departure on an offense characteristic or offender characteristic already taken into account . . . unless the court finds . . . that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

This Court earlier observed that the trial court articulated as reasons for its departure “defendant’s speed, his failure to brake, his familiarity with the route and his awareness of the presence of children and school buses, and the number of persons, including children, who witnessed Fisher’s death.” Slip op at 4. This Court then continued that, to the extent that the court based its departure on defendant’s driving record, that consideration was not otherwise considered in the scoring of the guidelines, and, given defendant’s record of “nine accidents, . . . six speeding tickets, and . . . five or six other technical violations,” it keenly and irresistibly grabbed the attention, was of considerable worth, was objective and verifiable, and thus was a valid basis for a departure. Slip op at 4.

This Court went on to reject defendant’s argument that the trial court erred in departing on the basis of factors already accounted for in the guidelines in taking into account the number of persons, including children, who witnessed the traffic fatality. Slip op at 5.

But this Court expressed concern that defendant’s speed, failure to brake, and familiarity with the route were accounted for in the scoring of Offense Variable 6, and, lacking a finding that that factor was not given adequate weight, thus introduced an invalid factor into the decision to depart. *Id.* Because this Court could not determine if the trial court “would have departed to

the same degree solely on the basis of the other reasons,” this Court remanded this case to the trial court for resentencing or rearticulation of the reasons for the departure. *Id.*

On remand, the trial court explained its departure as follows:

Certainly your prior driving record—several accidents, nine prior to this accident in ’87,’94,’95, you had two of them. ’96 and ’97 and ’98 and 99 and ’01.

Also in ’99 there was one careless driving. You had six speeding tickets. Five other technical violations including another careless driving on February 6th of ’92. . . . [I]t was quite clear throughout the trial and through your testimony itself that you were familiar with the route of travel and traveled it nearly daily. And because of that familiarity with the route, you had knowledge of the school children walking along Evergreen as well as crossing that highway. You were familiar with the periodic school bus stops along that road and the stops occurring during your time of travel

Clearly mandating anyone who was traveling on that road should approach the speed and travel with extraordinary caution. The flashing lights of the school bus alerting all drivers of the need to approach cautiously and to ultimately stop for that school bus. Observing the [car] immediate to the rear of the school bus and approaching slowly and ultimately stopping for the bus and [the victim] to pass, you speed at a high rate, according to the evidence and according to the testimony.

A speed for the conditions coming out from behind the stopped [car] and entering the left-turn lane for which it is illegal to pass and ultimately striking [the victim]. I’m satisfied that those listed items, that are not a part of the guidelines scoring, legitimately and properly take the sentencing out of the guidelines and permit the Court to exceed them.

The trial court thus expressly reiterated its reliance on defendant’s speed and familiarity with the route, two considerations of which this Court expressly disapproved for purposes of a departure, and impliedly, by contrasting defendant’s aggression with the slowing and stopping of the car ahead of him, reiterated its reliance on defendant’s failure to brake, also a consideration held invalid for purposes of a departure. We conclude that, because the trial court on remand again relied on three considerations earlier determined to be invalid, that the court’s retention of its decision to depart was a result lying beyond the principled range of outcomes. *Babcock*, *supra* at 269.

For these reasons, we again vacate defendant’s sentence and remand this case to the trial court for resentencing before a different judge.

Sentence vacated and case remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio